80-1108

NO.....

Supreme Court, U. S.
FILED
DEC 28 1980
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

OCTOBER TERM, 1980

ELIZABETH LOUISE SHARTEL, and MERCANTILE BANK AND TRUST CO., as Executor of the Estate of NINAH DUNLAP WAGNER SHERMAN, deceased,

Petitioners,

vs.

MARY ELLEN BLASINGHAM, CYNTHIA BLASINGHAM, ANN C. STRUNK, JOHN THOMAS WAGNER, HELEN W. BELL, LUM TWILLIGEAR, JR., LAVERNE TWILLIGEAR BROWN, JOHN ROBERT WAGNER, and JOHN MARK WAGNER,

Respondents,

DONALD B. SHORTRIDGE, Executor of the Estate of JOHN HENLEY EVERSOLE, deceased,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FOURTH JUDICIAL DISTRICT

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QUESTION PRESENTED

Whether the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution prohibits an Illinois court from applying a judicial rule of construction that excludes, through operation of a presumption, Elizabeth Louise Shartel from sharing under a class grant to the "children" of Ninah Dunlap Wagner Sherman, solely on the basis of her status as an adopted child of Ninah Dunlap Wagner Sherman.

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CONSTITUTION

Fourteenth Amendment United States Constitution 3, 7, 8

NO.....

—o—

In The

Supreme Court of the United States

OCTOBER TERM, 1980

—o—

Elizabeth Louise Shartel, Mercantile Bank and Trust Co., Executor of the Estate of Ninah Dunlap Wagner Sherman,

Petitioners,

vs.

Mary Ellen Blasingham, Cynthia Blasingham, Ann C. Strunk, John Thomas Wagner, Helen W. Bell, Lum Twilligear, Jr., Laverne Twilligear Brown, John Robert Wagner, and John Mark Wagner, and James W. Wagner; The Unknown Heirs of Ina Wagner, John M. Wagner and Ellen Wagner; The Descendants of Ninah Dunlap Wagner Sherman and Betty Lou Shartel; Beverly Cobb, Amy Rebecca Cobb, Mathew David Cobb, Susanne Robbins, Melissa Dawn Robbins, William Shartel Robbins, Rebecca Bagby, and Angela Bagby; All the Known or Unknown Heirs or Beneficiaries of Hazel Cunningham Wagner Voyles, Ina Wagner Nelson, Ralph Nelson (son of Ina Wagner Nelson), the predeceased son of Ina Wagner Nelson (name unknown), Orpha Olive Wagner Eversole, John Dwight Wagner and Joseph Ralph Wagner; Emily Wagner; All the Known or Unknown Descendants, natural or adopted, of Mary Ellen Blasingham, Cynthia Blasingham and Ann C. Strunk; John Randolph Mueller; All Known or Unknown Descendants, natural or adopted, of Lum Twilligear, Jr., Laverne Twilligear Brown, John T. Wagner, and Helen W. Bell; Mary Helen Dell, Lum Twilligear III, Karen Blakeslee, Kim Twilligear, Kathy Coffey Smith, James L. Coffey, Jr., Kevin Smith, Daniel Smith, Timothy Smith, and Nita Bell; The Descendants, natural or adopted, of John Robert Wagner, James Wayne Wagner, and John Mark Wagner; Catherine Wagner, Shelly Wagner and Steven Wagner; Any other Unknown Owners; of record or non-record, claimants of the property described herein, including tenants of said property,

Respondents,

Donald B. Shortridge, Executor of the Estate of John Henley Eversole,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FOURTH JUDICIAL DISTRICT

Elizabeth Louise Shartel and Merchantile Bank and Trust Company, as Executor of the Estate of Ninah Dunlap Wagner Sherman, deceased, by their attorney, Richard O. Erdmann, pray that a Writ of Certiorari issue to review the judgment of the Appellate Court of Illinois, Fourth Judicial District, which became final in the above-entitled case on September 29, 1980.

———o———

OPINION BELOW

The opinion of the Appellate Court of Illinois, Fourth District, in the above-entitled case is reported at 84 Ill. App. 3d 981, 406 N. E. 2d 565, 40 Ill. Dec. 559.

———o———

JURISDICTION

On September 29, 1980, the Supreme Court of Illinois denied leave to appeal from the judgment of the Appellate Court of Illinois, Fourth District, in the above-entitled case. The decision of the Appellate Court was entered on June 6, 1980, and Petition for Rehearing was denied on July 10, 1980. Jurisdiction of this Court is invoked under 28 U. S. C. § 1257 (3).

———o———

STATUTES INVOLVED

The pertinent portions of the Fourteenth Amendment to the United States Constitution provides as follows:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

———o———

STATEMENT

Respondent, Donald B. Shortridge, Executor of the Estate of John Henley Eversole, has brought this suit to enforce the decedent's claim to a one-fifth interest in a certain parcel of Illinois farmland. The pertinent facts of the case are as follows:

In 1912, John M. Wagner and Sarah E. Wagner, his wife, conveyed by deeds several parcels of land to four of their five children. The deed, which is the subject of this suit, reads in relevant part:

> "The grantors, John M. Wagner and Sarah Ellen Wagner, his wife . . . convey and warrant to Ninah Dunlap Wagner for and during her natural life and upon her death, then to her children, but if no child or children survive her then unto the child or children, and his, her, or their descendents surviving the above named grantors . . . "

Ninah Dunlap Wagner Sherman, the life tenant under the deed in issue, died during the pendency of this suit having no natural children. However, Elizabeth Louise Shartel, whom Ninah lawfully adopted in 1923, survived the life tenant and claimed title to the tract of land under the remainder.

The Respondent initiated this suit claiming that Ninah Sherman had no natural children, that Ninah's adopted daughter could not take under the class grant in the remainder, and that the decedent, therefore, took a one-fifth interest in the property under the contingent remainder as the sole heir of a child of the original grantors. The case was submitted, upon stipulated facts, to the Circuit Court of the Sixth Judicial Circuit, Douglas County, Illinois.

At the trial level, the court found that the land passed to the adopted child of the life tenant. The decision was based upon a finding that differing language in the four deeds executed together in 1912 indicated a specific intent to include adoptees in the class grant. The grantors had devised remainders, in the deeds to their daughters, to the "children" of the respective women. However, the deed executed to the grantors' son passed a remainder to the son's "children of his body begotten . . . " The court found that the grant to the son specifically excluded adoptees; therefore, the failure of the grantors to use such language in the deed to Ninah indicated an intent to include adopted children in the class grant.

Petitioners introduced their Equal Protection argument at the trial level. The arguments were raised initi-

ally at page 53 of the Supporting Brief for Answer of Defendants, filed on August 28, 1979 in open court. (See Appendix, Exhibit I.) In addition, petitioners presented their constitutional bases in oral arguments before the court on the same date. However, since the trial court based its decision on a finding of intent, neither the order nor the judge's Memorandum commented on the Equal Protection arguments.

Appeal from the trial decision was taken by the Respondents to the Appellate Court of Illinois, Fourth Judicial District. The Appellate Court found that the trial court's finding of fact was erroneous—that the facts presented at trial did not support the decision. As a result, the trial decision was reversed; the court announced that the intent of the grantors was unknown, and therefore, Illinois law required that the adoptee be excluded from the grant. The decision was based upon a judicial rule of construction that requires the presumptive exclusion of adoptees from such class grants executed prior to 1955. The opinion of the Appellate Court was filed on June 6, 1980. Your Petitioners filed a Petition for Rehearing which was denied by the court on July 10, 1980.

At the appellate stage, Petitioners again raised their Equal Protection arguments at page 77 of their appellate Brief, filed on February 6, 1980. (See Appendix, Exhibit G.) The contentions were also presented in oral arguments before the court. However, in its opinion, the Appellate Court neither responded to nor commented on the constitutional issues presented by your Petitioners.

On August 14, 1980, Petitioners filed for leave to appeal to the Supreme Court of Illinois. The arguments

based upon the Fourteenth Amendment to the Constitution were raised at page 10 of the Petition for Leave to Appeal. (See Appendix, Exhibit H.) The petition was summarily denied on September 29, 1980 with no response to any of Petitioners' contentions.

Motion to Stay the Mandate of the Supreme Court of Illinois, pending full disposition of this Petition for Writ of Certiorari, was filed with the Illinois Supreme Court on October 16, 1980, and was granted on October 21, 1980 by order of Justice Robert C. Underwood of the Supreme Court of Illinois.

———o———

REASONS FOR GRANTING THE WRIT

The issue presented here for review is one presently undecided by this Court, yet an issue of notable significance in determining the reach of Fourteenth Amendment protections. The present petition provides an opportunity for this Court to define the constitutional limitations that bear upon the power of state courts to propagate and perpetuate discriminatory classifications in the construction of instruments that pass or convey property.

The present decision of the Appellate Court of Illinois, Fourth Judicial District, was not based upon a finding that the grantors intended to exclude an adopted child of the life tenant. Instead, the ruling was based upon a judicially inspired and judicially imposed presumption that requires the exclusion of adoptees from the class of "children" under the type of deed at issue

here. (See Appendix, Appellate Court Opinion, p. 9.) It is clear that the acts of a state court constitute state action within the purview of the Fourteenth Amendment. *Shelley v. Kraemer,* 334 U.S. 1, 14 (1948). The application of the presumption against adoptees in the present case subjects the acting court to scrutiny under the commands of the Fourteenth Amendment. As such, it is the rationality of the classification underlying the court's decision and the propriety of exercising judicial power to create such a classification that must be measured against the constitutional mandate. Review by this Court is particularly critical since the exercise of judicial power is insulated, in the given instance, from the operation of normal democratic processes.

"To decide whether a law violates the Equal Protection Clause, we look, in essence, to three things: the character of the classification in question; the individual interests affected by the classification; and the governmental interests asserted in support of the classification." *Dunn v. Blumstein,* 405 U.S. 330, 335 (1972). Although the classification here at issue is admittedly not "suspect," the rights and interests affected by the classification merit constitutional review. This Court has expressly recognized that "the rights to acquire, enjoy, own and dispose of property" are undoubtedly protected by the Fourteenth Amendment. *Shelley v. Kraemer,* 334 U.S. 1, 10 (1948). Such rights are clearly burdened by operation of the present presumption. The classification not only precludes an adoptee from acquiring property through a class grant to "children" but the presumption also tends to stigmatize and emphasize, to the detriment of the adoptee, the adopted child's lack of natural familial connec-

tions. The governmental interest in presuming an anti-social intent to the grantor fares poorly against the individual interests that are adversely affected by the classification.

Just as the legitimacy classifications in *Trimble v. Gordon*, 430 U. S. 762 (1977), and *Lalli v. Lalli*, 439 U. S. 259 (1978), were measured against the standards of Equal Protection analysis, so too, the present discrimination against adoptees must be examined in a constitutional context. Since the state courts refused to make such a constitutional examination, this Court should review the classification—not only its rationality, but also its propriety under the Fourteenth Amendment standards against which the exercise of state judicial power are measured.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition should be granted.

Respectfully submitted,

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Date: December 22, 1980

APPENDIX

Exhibit A

In The Appellate Court of Illinois
Fourth Judicial District

Agenda No. —

General No. 15840

DONALD B. SHORTRIDGE, Executor of the Estate of John Henley Eversole,

Plaintiff-Appellee,

vs.

NINAH DUNLAP WAGNER SHERMAN, BETTY LOU SHARTEL,

Defendants-Appellees,

MARY ELLEN BLASINGHAM, CYNTHIA BLASINGHAM, ANN C. STRUNK, JOHN THOMAS WAGNER, HELEN W. BELL, LUM TWILLIGER, JR., LAVERNE TWILLIGEAR BROWN, JOHN ROBERT WAGNER, JAMES W. WAGNER, and JOHN MARK WAGNER,

Defendants-Appellants.

and

THE UNKNOWN HEIRS OF INA WAGNER, JOHN M. WAGNER, and ELLEN WAGNER,

Defendants-Appellees,

THE DESCENDANTS OF NINAH DUNLAP WAGNER SHERMAN and BETTY LOU SHARTEL, et al.,

Defendants-Appellees,

Appeal from Circuit Court, Douglas County 77-L-33
James N. Sherrick Judge Presiding

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OPINION/FILED JUNE 6, 1980

JUSTICES:

HONORABLE ALBERT G. WEBBER, III, J.

HONORABLE HAROLD F. TRAPP, J.

HONORABLE RICHARD MILLS, P. J.

Concurring

Dissenting

Porter—— Bur. N. A.—— O. S. A. D.—— Crim. Justice—— West—— Ill. Bar—— S. A. A. S. C. Springfield—— Pub. Dfr.—— C. C. H.—— Appellate Research—— S. A. A. S. C. Elgin—— Chf. Judge—— OFFICE COPY—— Other——

STATE OF ILLINOIS

APPELLATE COURT

AT AN APPELLATE COURT, for the Fourth Judicial District of the State of Illinois, sitting at Springfield:

PRESENT

HONORABLE ALBERT G. WEBBER, III, Judge

HONORABLE HAROLD F. TRAPP, Judge

HONORABLE RICHARD MILLS, Judge

Attest: Thomas R. Appleton, Clerk

BE IT REMEMBERED, that to-wit: On the 6th day of JUNE, A. D. 1980, there was filed in the office of the Clerk of the Court an opinion of said Court, in words and figures following:

STATE OF ILLINOIS

Appellate Court
Fourth District

General No. 15840

DONALD B. SHORTRIDGE, Executor of the Estate of John Henley Eversole,

Plaintiff-Appellee,

vs.

NINAH DUNLAP WAGNER SHERMAN, BETTY LOU SHARTEL,

Defendants-Appellees,

MARY ELLEN BLASINGHAM, CYNTHIA BLASINGHAM, ANN C. STRUNK, JOHN THOMAS WAGNER, HELEN W. BELL, LUM TWILLIGER, JR., LAVERNE TWILLIGEAR BROWN, JOHN ROBERT WAGNER, JAMES W. WAGNER, and JOHN MARK WAGNER,

Defendants-Appellants,

and

THE UNKNOWN HEIRS OF INA WAGNER, JOHN M. WAGNER, and ELLEN WAGNER,

Defendants-Appellees,

THE DESCENDANTS OF NINAH DUNLAP WAGNER SHERMAN and BETTY LOU SHARTEL, et al.,

Defendants-Appellees.

Appeal from Circuit Court Douglas County—77 L 33
Honorable James N. Sherrick Judge Presiding.

MR. JUSTICE WEBBER delivered the opinion of the court:

This appeal lies from an order of the circuit court of Douglas County declaring the rights of the parties under section 57.1 of the Civil Practice Act (Ill. Rev. Stat. 1977, ch. 110, par. 57.1). The question presented is the ownership of 320 acres of farm land located in Douglas County. The trial court, sitting without a jury, tried the case on a stipulation of facts and permitted an adopted child to take as a remainderman under a deed executed in 1912.

In order better to understand the respective contentions of the parties on appeal, some recitation of the facts and the alignment of the parties, both on the trial and appellate levels, is required.

In 1912, John W. Wagner and Sarah E. Wagner, his wife, being possessed of considerable land, made conveyances by deed of separate tracts of land to four each of their five children. There is no evidence, but it is generally accepted by the family that an equivalent gift of cash was made to the fifth child.

The language in controversy in the deed which is the subject of this litigation reads as follows:

> "The grantors, John M. Wagner and Sarah Ellen wagner, his wife, of the county of Douglas in the State of Illinois, for and in consideration of the sum of sixty-four thousand dollars in hand paid, convey and warrant to Ninah Dunlap Wagner for and during her natural life and upon her death, then to her children, but if no child or children survive her then unto the child or children, and his, her or their descendants surviving the above named grantors, the following described real estate, to wit: * * *."

Ninah Dunlap Wagner was a daughter of John and Sarah Wagner. Conveyances of other property with identical language in the deeds were made to two other daughters, Orpha and Hazel. A fourth conveyance was made to a son, John Dwight Wagner, with the following variation in language:

> "* * * for and during his natural life and upon his death, then unto the children of his body begotten of lawful marriage, but if no child or children survive him, then unto the child or children and his, her descendants surviving the above named grantors * * *."

All five children, namely, Ninah Dunlap Wagner Sherman, Hazel Wagner Voyles, Joseph Ralph Wagner, Orpha Wagner Eversole and John Dwight Wagner, survived their parents, the grantors in the deeds. All of them except Ninah had died at the time this suit was filed.

Ninah Dunlap Wagner Sherman, the life tenant under the deed in question, was alive at the institution of this lawsuit but died during its pendency. She had no natural children but adopted one child, Betty Lou Shartel, defendant-appellee (herein Elizabeth Louise Shartel), whom the trial court held to be a "child" within the meaning of the limitation in the 1912 deed.

The plaintiff in this action is the executor of John Henley Eversole, the only child of Orpha Eversole, one of the children named above. He claims that his decedent became the owner of an undivided one-fifth of the land under the deed to Ninah Dunlap Wagner Sherman. This claim is premised on the conclusion that Elizabeth Louise Shartel, being an adopted child, could not take as a remainderman under the 1912 deed and therefore his de-

cedent took the 1/5th share as a descendant of his mother, one of the children of the grantors who survived them.

Defendants on the trial level were Ninah and her adopted daughter Elizabeth, together with all the living grandchildren and great-grandchildren of the grantors. As previously indicated and as will be more fully developed below, the trial court held in favor of the defendant Elizabeth Louise Shartel, adopted daughter of Ninah. Its final order places the fee simple title to the premises in Elizabeth.

On appeal the parties have realigned themselves. The living grandchildren and great-grandchildren (herein grandchildren) are appellants and plaintiff and Elizabeth are appellees. The first and primary issue on appeal is whether Elizabeth, as an adopted child, can take as a remainderman under the deed. If she cannot, plaintiff and grandchildren will share in the premises, and therefore as to this issue, plaintiff as an appellee has aligned himself with the grandchildren appellants.

All parties have raised and briefed on appeal a second issue which was not passed upon by the trial court: Assuming that Elizabeth cannot take as a remainderman, at what time, the death of the surviving grantor or the death of the life tenant, does the alternative contingent remainder vest? Since the trial court held in favor of Elizabeth, it was not necessary for it to reach this issue. Ordinarily we would not entertain this issue under the circumstances, but since we have concluded that the trial court was in error on the primary issue, we feel compelled to speak under the authority of Supreme Court Rule 366(a)(5) (73 Ill. 2d R. 366(a)(5)) in order to avoid fur-

ther litigation and appeals. We have also denied a motion of Child Care Association of Illinois for leave to file a brief *amicus curiae.*

We turn then to the primary issue. A indicated above, the deed was executed in 1912; John W. Wagner, one of the grantors, died in 1919; Sarah E. Wagner, the other grantor, died in 1923; all five of their children survived in 1923; Ninah Dunlap Wagner Sherman adopted Elizabeth Louise Shartel in 1927. Given this set of facts, the instant case is *prima facie* governed by the leading case of *Belfield v. Findlay* (1945), 389 Ill. 526, 60 N. E. 2d 403. In its memorandum opinion the trial court expressly rejected *Belfield* and held that it contained a "fallacy." In this court Elizabeth makes varied attacks on the rule of *Belfield,* urging that it is bad law and contrary to modern concepts of sociology and public policy.

Without attempting to answer in detail all these arguments, we deem it sufficient to say that it is not the province of this court, or of any court, whether *nisi prius* or of intermediate appeal, to overrule the supreme court. Furthermore, the rationale of *Belfield* was reaffirmed by the supreme court as recently as October 1979, in *Ford v. Newman* (1979), 77 Ill. 2d 335, 396 N. E. 2d 539.

In *Belfield,* the testator devised land to her son, Arthur Findlay, for life and on his death "the said land to go to his children, or if he leaves no children surviving him, then said land is to go to my daughters." The testator executed the will in 1916 and died in 1930. Arthur Findlay adopted Nelson Findlay in 1939. Nelson was born in 1933. The plaintiffs were sisters and descendants of sisters of Arthur; Nelson was the defendant and claimed

that he could take the land under the adoption statute. The supreme court held that he could not and said:

> "* * * Here, defendant, the adopted child, was not born until seventeen years after the execution of the will of Sarah Findlay and, we note again that she died three years prior to defendant's birth and nine years before he was adopted. It follows that, under the law established by applicable decisions, defendant is not the owner of the property in controversy." 389 Ill. 526, 533-34, 60 N. E. 2d 403, .

The Adoption Act in force at the time of the delivery of the deed in the instant case in 1912 is the same as was in effect in *Belfield* (Ill. Rev. Stat. 1874, ch. 4, par. 5) and read as follows:

> "A child so adopted shall be deemed, for the purposes of inheritance by such child, and his descendants and husband or wife, and other legal consequences and incidents of the natural relation of parents and children, the child of the parents by adoption, the same as if he had been born to them in lawful wedlock, except that he shall not be capable of taking property expressly limited to the body or bodies of the parents by adoption, nor property from the lineal or collateral kindred of such parents by right of representation."

The *Belfield* court held *inter alia* that the defendant there was attempting to take by right of representation and thus was expressly excluded by the statute. This has been severely criticized by commentators as erroneous and such criticism has been cited by Elizabeth in the instant case; *e.g., Carey & Schuyler, Illinois Law of Future Interests,* sec. 139,1954 pocket parts. However, the court also placed its decision on another ground when it said: "Although favoring the taking by an adopted child

of the estate of his adoptive parents, the law does not extend the privilege beyond the parties directly participating in the adoption proceedings, unless an intention to do so is clearly warranted." 389 Ill. 526, 533, 60 N. E. 2d 403, .

The court pointed out a case in which an adopted child was known to the testator and was within his contemplation (*Munie v. Gruenewald* (1919), 289 Ill. 468, 124 N. E. 605) and likewise pointed out other cases in which the testator manifestly did not have adopted children in mind when the will was made. It held that the case before it fell into the latter category and used the language cited above.

In the instant case it is apparent that the trial court used the latter basis for its decision. While being critical of *Belfield* in general, the trial judge held that the difference in language between the deeds to Ninah and her sisters and the deed to their brother indicates that the grantors had something different in mind, to-wit, possible adoption of children by the sisters. However, this would lead to an incongruous result that an adopted child of the brother would be specifically excluded by the statute while the adopted children of the sisters would be included by implication. Plaintiff argues that the difference in language is intended to exclude illegitimates so far as the brother is concerned. However, this would lead to the equally incongruous result that under the Descent Act of 1872 (Ill. Rev. Stat. 1937, ch. 39, par. 2) illegitimates of the sisters would be included as a matter of law. The difference in language among the deeds is too insolubly ambiguous to serve as a predicate for the inclusion of adoptees. Exactly what the grantors had in

mind may never be known, but it is known that they are presumed to have made the deeds in accordance with the law in existence at the time. As the *Belfield* court said: "The testatrix, Sarah Findlay, is presumed to have made her will in accord with the statute on adoption in force at the time the will was executed. This presumption is written into the will as much as any part of the will itself." 389 Ill. 526, 532, 60 N.E. 2d 403, accord, *Stewart v. Lafferty* (1957), 12 Ill. 2d 224, 145 N.E. 2d 640.

In this connection the court in *Belfield* also said: "The state of the law at the time the will was made, therefore, affords considerable assistance in ascertaining the intention of the testator when such intention is otherwise not clear. *Carpenter v. Browning,* 98 Ill. 282." 389 Ill. 526, 529, 60 N.E. 2d 403.

In summary, then, we reject any theory of representation; we find that any difference in language in the four deeds affords no basis for determining the intent of the grantors; but we do find that the state of the law in 1912 determines that the intent of the grantors was to exclude adoptees as remaindermen.

We believe that our conclusion is strengthened by the language of the amendment of 1955 to section 14 of the Probate Act (now Ill. Rev. Stat. 1977, ch. 110½, par. 2-4) which provided that an adopted child was deemed a natural child unless the contrary intent plainly appeared, but limited the amendment to instruments executed after September 1, 1955, and specifically mandated that it should not be used in construing instruments executed prior to September 1, 1955.

Having concluded that the trial court was in error in finding a fee simple title to be in Elizabeth, we must next consider a question not reached by the trial court concerning the time at which the alternative contingent remainder created in the 1912 deed vested. As we have already stated above, normally any question not reached on the trial level is remanded for consideration. However, what is presented here is a pure question of law and we believe that under Supreme Court Rule 366 (a)(5) we have the power to "give any judgment * * * that ought to have been given or made * * * " (73 Ill. 2d R. 366 (a)(5)).

On this question the three groups of parties to this appeal realign themselves further depending on where their respective interests lie. Plaintiff-appellee claims that the remainder vested on the death of the last grantor; Elizabeth and the grandchildren claim that it did not vest until the death of the life tenant, Ninah. While it is not precisely clear from the record, a fair appraisal of filing dates and allegations would indicate that plaintiff's decedent died before Ninah and the record is clear that he died childless. Therefore, if the remainder vested on the death of the life tenant, any share attributable to him would be pyramided on the others.

Elizabeth and the grandchildren rely largely on *Drury v. Drury* (1915), 271 Ill. 336, 111 N.E. 140, and its progeny. In *Drury,* the supreme court found no language in the will which limited the remainder to those in existence at the death of the testator; it then applied the rule that when a class gift is not so limited, the members of the class must survive the life tenant in order to take.

We find *Drury* inapplicable here for two reasons. First, the plain language of the 1912 deed refers to "descendants surviving the above named grantors." In this there is no ambiguity and hence no necessity for construction. Second, in *Hofing v. Willis* (1964), 31 Ill. 2d 365, 201 N. E. 2d 852, the supreme court expressly disapproved *Drury* as a mechanical and universal rule of construction, assuming that construction is required.

The grandchildren argue that the use of the word "then" indicates an intention to postpone vesting; *i.e.*, " • • • to Ninah • • • and upon her death, then to her children • • • then unto the child or children, and his, her or their descendants • • • ."

We do not view the use of "then" in this context as chronological but rather as a matter of enumeration or narration.

The grandchildren further argue that vesting on the death of the grantors opened up the potential for the life tenants to take a portion in fee and that this is inconsistent with the over-all scheme of distribution of keeping the property within the general class of "descendants." We find nothing to prevent such a result. A life tenant may be included in a class of remaindermen in the absence of a specific intent to exclude him. *Himmel v. Himmel* (1920), 294 Ill. 557, 128 N. E. 641; *In re Estate of Evans* (1975), 31 Ill. App. 3d 753, 334 N. E. 2d 850.

Throughout this litigation the parties have treated the deeds referred to above as deeds of gift rather than as deeds of purchase, even though they recite an unusually large consideration. The stipulation of facts upon

which the case was decided in the trial court refers to "a separate gift in cash" to the fifth child. From these premises we also have elected to treat the deeds as those of gift and express no opinion as to whether the limitations contained in them would be valid in the case of a deed of purchase.

The order of the circuit court of Douglas County finding a fee simple title to the premises in Elizabeth Louise Shartel is reversed. It is the further order of this court that the remainder vested on the death of the last grantor. The cause is therefore remanded to the circuit court of Douglas County with directions to enter an amended order in accordance with the views herein expressed.

Reversed and remanded with directions.

MILLS, P.J., and TRAPP, J., concur.

Exhibit B

(Filed July 11, 1980)

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

Springfield 62701

Thomas R. Appleton, Clerk

Telephone
Area Code 217
782-2586

Date: July 10, 1980
Re: Shortridge v. Sherman
General No. 15840

TO COUNSEL:

The Court today denied the petition for rehearing in the above entitled cause.

It is noted that the mandate has been stayed, with intention of appellees Sherman and Shartel to file petition for leave to appeal to the Illinois Supreme Court.

Thomas R. Appleton, Clerk
Appellate Court
Fourth District

TRA:pd

To: Follmer, West & Erdmann
George V. Eighmey/Thomas, Mamer, Haughey & Miller
Busch, Harrington & Porter/W. Kenneth Porter

Jerry Bromiel/Webber & Thies, P.C.
John H. Elder/Meyer, Capel, Hirschfeld, Muncy, Jahn & Aldeen
Paul C. Hendren/Williamson, Miller & Hendren

Exhibit C

ILLINOIS SUPREME COURT
Clell L. Woods, Clerk
Supreme Court Building
Springfield, Ill. 62706
(217) 782-2035

September 29, 1980

Fommer, West & Erdmann
Attorneys at Law
201 W. Springfield Ave.
Champaign, IL 61820

No. 53793—Donald B. Shortridge, Exr., etc., respondent, vs. Elizabeth Louise Shartel, et al., etc., petitioners (Mary-Ellen Blasingham, et al., respondents). Leave to appeal, Appellate Court, Fourth District.

The Supreme Court today denied the petition for leave to appeal in the above entitled cause.

Very truly yours,
/s/ Clell L. Woods

Clerk of the Supreme Court

Exhibit D

IN THE CIRCUIT COURT OF THE
SIXTH JUDICIAL CIRCUIT

DOUGLAS COUNTY, ILLINOIS

NO. 77-L-33

(Filed January 11, 1980)

Donald B. Shortridge, Executor of the Estate of John Henley Eversole, *Plaintiff,*

vs.

Ninah Dunlap Wagner Sherman, Betty Lou Shartel, Mary Ellen Blasingham, Cynthia Blasingham, Ann C. Strunk, John Thomas Wagner, Helen W. Bell, Lum Twilligear, Jr., Lavern Twilligear Brown, John Robert Wagner, James W. Wagner, and John Mark Wagner;

The Unknown Heirs of Ina Wagner, John M. Wagner and Ellen Wagner;

The Descendants of Ninah Dunlap Wagner Sherman and Betty Lou Shartel;

Beverly Cobb, Amy Rebecca Cobb, Mathew David Cobb, Susanne Robbins, Melissa Dawn Robbins, William Shartel Robbins, Rebecca Bagby, and Angela Bagby;

All the Known or Unknown Heirs or Beneficiaries of Hazel Cunningham Wagner Voyles, Ina Wagner Nelson, Ralph Nelson (son of Ina Wagner Nelson), the predeceased son of Ina Wagner Nelson (name unknown), Orpha Olive Wagner Eversole, John Dwight Wagner and Joseph Ralph Wagner;

Emily Wagner;

All the Known or Unknown Descendants, natural or adopted of Mary Ellen Blasingham, Cynthia Blasingham and Ann C. Strunk;

John Randolph Mueller;

All Known or Unknown Descendants, natural or adopted, of Lum Twilligear, Jr., Laverne Twilligear Brown, John T. Wagner, and Helen W. Bell;

Mary Ellen Dell, Lum Twilligear III, Karen Blakeslee, Kim Twilligear, Kathy Coffey Smith, James L. Coffey, Jr., Kevin Smith, Daniel Smith, Timothy Smith, and Nita Bell;

The Descendants, natural or adopted, of John Robert Wagner, James Wayne Wagner, and John Mark Wagner;

Catherine Wagner, Shelly Wagner and Steven Wagner;

Any other Unknown Owners, of record or non-record, claimants of the property described herein, including tenants of said property, *Defendants.*

ORDER

This cause coming on to be heard upon the complaint filed by Plaintiff, the answers and entries of appearance of the various parties, other pleadings filed therein (including oral motions), and the Stipulation of Facts by the parties; the Court having reviewed the evidence as presented in the Stipulation of Facts and all other evidence adduced and the briefs of the parties and having heard the arguments of counsel, and now being fully advised in the premises, finds as follows:

1. The Court has jurisdiction of the parties and the subject matter herein.

2. All defendants have been duly served with process according to law and proper notice has been given to all parties.

3. The facts set forth in the Stipulation of Facts filed herein are true.

4. In 1912, Ninah Dunlap Wagner was an unmarried adult. Subsequent to 1912, but prior to 1927, she married Orville M. Sherman. She had no natural children, but in 1927 adopted the defendant, Elizabeth Louise Shartel. Ninah Dunlap Wagner died in 1979 survived by her adopted daughter.

5. On June 10, 1912, grantor John M. Wagner and grantor Sarah E. Wagner were aware of the distinction between "children" and "children of his body", as evidenced by the grantors' deed to John Dwight Wagner et al. the same date. The deed being construed in this case, being to Ninah Dunlap Wagner for and during her natural life and upon her death, then unto her children, but if no child or children survive her, then to alternate takers, should not be construed to mean "children of his (her) body." Had the grantors so intended, they would have used those words. By using the phrase "then unto her children" the grantors intended to include adopted children.

WHEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

A. Mercantile Bank and Trust Company, as Executor of the Estate of Ninah Dunlap Wagner Sherman, deceased, is substituted as a defendant for said Ninah Dunlap Wagner Sherman. All defendants who have failed to answer or otherwise appear are hereby defaulted and an order pro-confesso is hereby entered against each of them.

B. Upon the death of Ninah Dunlap Wagner Sherman on June 4, 1979, the fee simple interest in the real property described as the South One-Half (S½) of Section Twenty-five (25) in Township Sixteen (16) North, Range

Ten (10) East of the Third Principal Meridian, and containing Three Hundred Twenty (320) acres, situated in the County of Douglas, in the State of Illinois, became vested in Elizabeth Louise Shartel.

ENTER: James N. Sherrick
Judge

DATED: January 11, 1980
AGREED AS TO FORM:
/s/ George V. Eighmey, Esq.
/s/ W. Kenneth Porter, Esq.
John Elder, Esq.
Carl Webber, Esq.
Paul Hendren, Esq.
Lois Eversole
/s/ Richard O. Erdmann, Esq.

Exhibit E

(Filed October 1, 1979)

IN THE CIRCUIT COURT OF
DOUGLAS COUNTY, ILLINOIS

DONALD B. SHORTRIDGE, Executor of the Estate of John Henley Eversole,

Plaintiff,

vs.

NINAH DUNLAP WAGNER SHERMAN, et al.,

Defendants.

AT LAW
NO. 77-L-33

M E M O R A N D U M

The question presented to the Court is what is the legal effect of a 1912 deed which granted a life estate "to Ninah

Dunlap Wagner for and during her natural life and upon her death, then unto her children, but if no child or children survive her, then unto the child or children and his, her, or their descendants surviving the above-named grantors."

In 1912, Ninah Dunlop Wagner was approximately 25 years of age and was unmarried. She had no natural born, children, but in 1927 adopted the defendant, Elizabeth Louise Shartel. Sometime between 1912 and 1927, Ninah Dunlap Wagner married a Mr. Sherman. Ninah Dunlap Sherman died in 1979. Does Elizabeth Louise Shartel take the remainder as a child of Ninah Dunlap Sherman?

In construing the above granting clause, the intent of the grantors is paramount. Extrinsic evidence is admissible to arrive at the intent. Also, the grantors are presumed to know the existing law and to have worded the deed accordingly.

Section 5 of the Adoption Act in effect in 1912 reads as follows:

> "A child so adopted shall be deemed, for the purposes of inheritance by such child, and his descendants and husband or wife, and other legal consequences and incidents of the natural relation of parents and children, the child of the parents by adoption, the same as if he had been born to them in lawful wedlock, except that he shall not be capable of taking property expressly limited to the body or bodies of the parents by adoption, nor property from the lineal or collateral kindred of such parents by right of representation."

Thus, to the adopting parents, the adopted child was a child for all purposes. This fact the grantors were presumed to know. The wording of the deed was in part, "upon her death, then unto her children." Subsequent to

1912, Ninah Dunlap Sherman might have children born to her, or she might adopt a child. In either event, in the purview of the existing law, all would be *her* children. This the grantors were aware of when they drafted the deed.

On the same day as the deed in question, a deed of like acreage was made to John Dwight Wagner, a brother of Ninah Dunlap Sherman, giving him a life estate, and "upon his death, then unto the children of his body begotten of lawful marriage." Thus, the grantors were aware of the distinction between "children" and "children of his body."

The deed in question should not be construed to mean "children of his (her) body." Had the grantors so intended, they would have used those words.

Numerous cases have been cited by counsel. However, cases using the terms "descendants", "issue", "lineal", and "heirs of the body", and those decided before the passage of an adoption statute, are of limited assistance in construing the instant deed. The only case that I deem to be quite similar is *Belfield v. Findlay,* 389 Ill. 526, 60 N. E. 2d 403. This case takes the position opposite to the position that I have reached.

The Belfield case involved a Will executed in 1916 and probated in 1930. The devise was to A for life and on his death to his children; if he leaves no children surviving him, then to my daughters. The Belfield court ruled that an adopted child, born after the probate of the Will, would not take the remainder. There was a vigorous dissent. The fallacy in the Belfield court's reasoning can be found in this sentence, which was the cornerstone of the court's holding:

> "In order to successfully conform to the requirements of the prohibitions contained in the exceptions specified in section 5 of the Adoption Act, it is requisite that a showing be made, not only that he is a "child" of Arthur Findlay, his adoptive parent, but, also, that the testatrix had him in mind as a lineal descendant when she executed her Will."

There was no basis in the facts of the case for the Court to find the testatrix must have the adopted child in mind as a *lineal* descendant. Certainly the Adoption statute would not indicate that in construing the Will a "child" must be a lineal descendant of the adopting parents.

In conclusion, the Adoption statute of 1912, which the grantors were presumed to know, plainly indicates an adopted child would come within the phrase of the deed, "then unto her children." Also, the deed to John Dwight Wagner on the same date indicates that if the grantors intended "her children" to mean lineal descendants, they would have so indicated.

For the above reasons, I find and declare that due to the death of Ninah Dunlap Sherman, the fee to the 320 acres in question is now vested in Elizabeth Louise Shartel.

DATED this 28th day of September, A. D. 1979.

/s/ James N. Sherrick

Circuit Judge

Exhibit F

(Received October 22, 1980)

State of Illinois
Office of
Clerk of the Supreme Court
Springfield
62706

Clell L. Woods, Clerk Telephone (217) 782-2035

October 21, 1980

Follmer, West & Erdmann
Attorneys at Law
201 West Springfield Avenue
Champaign, IL 61820

In re: Donald B. Shortridge, Exr., etc., respondent, vs. Elizabeth Louise Shartel, et al., etc., petitioners (Mary Ellen Blasingham, et al., respondents). No. 53793

Gentlemen:

This office has today received and filed an order entered by Justice Robert C. Underwood directing that the issuance of the mandate of this Court be stayed pending disposition of a petition for certiorari to be filed in the Supreme Court of the United States concerning the above entitled cause.

Very truly yours,

/s/ Clell L. Woods
Clerk of the Supreme Court

CLW:gn
cc—Thomas, Mamer, Haughey
& Miller

Exhibit G

5. TO DENY AN ADOPTED CHILD THE SAME RIGHTS, PRIVILEGES, AND IMMUNITIES AS A NATURAL CHILD SIMILARLY SITUATED WOULD ALSO BE A VILOATION OF THE EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND OF ARTICLE I, SECTION 2 OF THE ILLINOIS CONSTITUTION.

In *Trimble v. Gordon,* 430 U. S. 762, 97 S. Ct. 1459, 52 L. Ed. 2d 31 (1977) the U. S. Supreme Court held that § 12 of the Illinois Probate Act, which provided that illegitimates could not inherit from their fathers, violated the equal protection clause of the U. S. Constitution. The Court said

> The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bounds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility for wrong-doing. Obviously no child is responsible for his birth and penalizing the child is an ineffectual—as well as an unjust —way of deterring the parent. (430 U. S. at 770).

The Court then noted that illegitimate children cannot effect their own status. The Court held that there was no rational relationship between the statute's legitimate-illegitimate child distinction and a legitimate state purpose. The Court did not require a determination that the classification was "suspect." Similarly, even if the distinction sought to be made by Plaintiff and other defendants in Illinois decisional law or statute between

adopted children and natural children is not "suspect," this Court should hold that there is no rational relationship between the natural-adopted child distinction and any legitimate state purpose. The 1912 deed certainly contains nothing expressly indicating any desire by the grantors to make any such distinction. If such a distinction is to be made in this case, it must be as a matter of law. Yet it cannot be seriously contended that any legitimate state purpose would be served by such a distinction. (In fact, it is quite clear that this State's purpose and policy is to promote equality between adopted and natural children.) As in the *Trimble* case, the child involved in the case cannot affect her status as an adopted child. Although it should not be necessary for this Court to reach this constitutional issue in holding in favor of the adopted child, defendant Elizabeth Louise Shartel urges this Court on an alternative basis for ruling in the adopted child's favor to hold that the natural child-adopted child distinction urged by plaintiff and certain defendants violates the equal protection clauses of the U. S. and Illinois Constitutions.

Exhibit H

D. THE RULE OF LAW ANNOUNCED BY *BELFIELD* AND FOLLOWED BY THE APPELLATE COURT VIOLATES THE CONSTITUTIONAL RIGHT OF ADOPTED CHILDREN TO EQUAL PROTECTION OF LAW, A POINT IGNORED BY BOTH THE *BELFIELD* COURT AND THE PRESENT APPELLATE COURT.

In *Trimble v. Gordon,* 430 U. S. 762, 97 S. Ct. 1459, 52 L. Ed. 2d 31 (1977), the U. S. Supreme Court held that § 12 of the Illinois Probate Act, which provided that illegitimates could not inherit from their fathers, violated the equal protection clause of the U. S. Constitution. The court said

> The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bounds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility for wrongdoing. Obviously no child is responsible for his birth and penalizing the child is an ineffectual—as well as an unjust—way of deterring the parent. (430 U. S. at 770).

Similarly, there is no rational relationship between the natural-adopted child distinction and any legitimate state purpose. The appellate court decision, based on such a distinction, therefore violates the equal protection clauses of the United States and Illinois constitutions.

Exhibit I

3. *To deny an adopted child the same rights, privileges, and immunities as a natural child similarly situ-*

ated would for that reason alone also be a violation of the Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution and of Article I, Section 2 of the Illinois Constitution.

In *Trimble v. Gordon, U.S.* 97 S. Ct. 1459, 52 L. Ed. 2d 31 (1977) the U. S. Supreme Court held that § 12 of the Illinois Probate Act, which provided that illegitimates could not inherit from their fathers, violated the equal protection clause of the U. S. Constitution. The Court said "The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bounds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility for wrong-doing. Obviously no child is responsible for his birth and penalizing the child is an ineffectual—as well as an unjust—way of deterring the parent." 97 S. Ct. at ———. The Court then noted that illegitimate children cannot affect their own status. The Court held that there was no rational relationship between the statute's legitimate-illegitimate child distinction and a legitimate state purpose. The Court did not require a determination that the classification was "suspect." Similarly, even if the distinction sought to be made by Plaintiff and other defendants in Illinois decisional law or statute between adopted children and natural children is not "suspect," this Court should hold that there is no rational relationship between the natural-adopted child distinction and any legitimate state purpose. The 1912 deed certainly contains nothing expressly

indicating any desire by the grantors to make any such distinction. If such a distinction is to be made in this case, it must be as a matter of law. Yet it cannot be seriously contended that any legitimate state purpose would be served by such a distinction. (In fact, it is quite clear that this State's purpose and policy is to promote equality between adopted and natural children.) As in the *Trimble* case, the child involved in the case cannot affect her status as an adopted child. Although it should not be necessary for this Court to reach this constitutional issue in holding in favor of the adopted child, defendants Ninah Dunlap Wagner Sherman and Betty Lou Shartel urge this Court on an alternative basis for ruling in the adopted child's favor to hold that the natural child-adopted child distinction urged by plaintiff and certain defendants violates the equal protection clauses of the U. S. and Illinois Constitutions.